Supreme Court, U.S.
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No. 95-2003

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAMES T. BENSON,
Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA and
CONTEL OF VIRGINIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeal for the Fourth Circuit

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BRIEF IN OPPOSITION FOR COMMUNICATIONS WORKERS OF AMERICA

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14pp

QUESTIONS PRESENTED

Does the duty of fair representation prohibit a union from forcefully advocating a single interpretation of that takes a grievance arising under a collective bargaining agreement to arbitration agreement that the union has reasonably determined the benefits the represented group as a whole where doing so is detrimental to the short-term interests of a represented individual member of the group?

Does the National Labor Relations Act, construed as prohibiting arbitrary, discriminatory and bad faith conduct by unions toward represented individuals, deprive union represented employees of due process in violation of the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Air Line Pilots v. O'Neill, 499 U.S. 65 (1991) 5
Bache v. American Telephone & Telegraph Co., 840 F.2d 283 (5th Cir.), *cert. denied*, 488 U.S. 888 (1988) 6
Bures v. Houston Symphony Society, 503 F.2d 842 (5th Cir. 1974) 9
Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *cert. denied*, 362 U.S. 962 (1960) 7
Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) 6
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) .. 5
Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167 (5th Cir. 1971) 7
Kushto v. Broth. of Railway, Airline & SS Clerks, 818 F.2d 290 (4th Cir. 1987) 6
Miller Brewing Co. v. Brewery Workers Local Union No. 9, 562 F.Supp. 1368 (E.D. Wis. 1983), *aff'd in part, rev'd in part on other grounds*, 739 F.2d 1159 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) 8
Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964) 9
Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980) 7, 8
Steele v. Louisville & Nashville RR, 323 U.S. 192 (1944) 4, 5, 6, 9
Steelworkers v. Sadlowski, 457 U.S. 102 (1982) 9
Steelworkers v. Weber, 443 U.S. 193 (1979) 9
Thompson v. International Association of Machinists, 258 F.Supp. 235 (E.D. Va. 1966) 9
Vaca v. Sipes, 368 U.S. 171 (1967) 8, 10

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The decisions below, the basis of this Court's jurisdiction and the constitutional and statutory provisions involved are set out at, pp. 1, 1a-44a & 78a of the *certiorari* petition.

STATEMENT OF THE CASE

This case arises out of a dispute between Contel of Virginia, Inc. and the Communications Workers of America over the proper weight to be accorded seniority in promoting employees covered by the collective bargaining agreement between the Company and the Union and out of a grievance-arbitration precipitated by that contract dispute.

In early 1990, Contel selected James Benson, the plaintiff-petitioner here, to fill a service technician vacancy. Pet. App. 19a. In so doing, Contel bypassed Barbara Kirker, another admittedly qualified applicant for the position, who had substantially more seniority than Mr. Benson.

Id. CWA challenged the Company's decision on the ground that the collective bargaining agreement required the selection of the most senior employee from among the qualified applicants. *Id.*

The agreement's seniority clause provides that "[i]n selecting employees . . . for assignments to higher rated non-management classification, the best qualified senior applicant will be considered to fill the particular vacancy." Pet. App. 19a. A 1990 decision by arbitrator Robert Ables interpreted this language to mean that "the union employee needs only to show he or she is qualified for the position to be entitled to apply seniority as priority for the job." Pet. App. 3a.

Relying on the contract language, as interpreted by the 1990 arbitration decision, CWA argued at arbitration that Ms. Kirker was entitled to the promotion because she was admittedly qualified and she had more seniority than the other qualified applicants. Pet. App. 20a. Contel argued, to the contrary, that the contract entitled it to select the most qualified applicant. *Id.*

Consistent with its position, CWA did not call Ms. Kirker or any other witness to testify to her qualifications, nor did the Union advance any argument concerning the relative qualifications of Ms. Kirker or Mr. Benson. Pet. App. 20a. And, consistent with its position, Contel presented extensive evidence and testimony to the effect that Mr. Benson was substantially more qualified than Ms. Kirker. *Id.* at 20a & 22a. In preparing its case, Contel conferred extensively with Mr. Benson; the Company did not, however, call him as a witness. *Id.* at 14a.

Arbitrator Norman Harlan decided the dispute over the service technician vacancy by finding that Contel had impermissibly selected Mr. Benson on the basis of qualifications that had not been listed in the Company's own job posting. Pet. App. 75a-76a. The arbitrator concluded that Ms. Kirker "met the job qualifications as posted," and thus was entitled to the promotion based on her greater seniority. *Id.* at 76a. Having decided the grievance on this basis, the arbitrator found it unnecessary to

resolve the dispute between Contel and CWA over the precise weight accorded seniority by the agreement. *Id.* at 36a-37a.

When Contel complied with the arbitration decision by awarding the service technician promotion to Ms. Kirker, Mr. Benson filed suit alleging that CWA had breached its duty of fair representation by failing to afford him an opportunity to offer testimony in support of the Contel's promotion decision and that Contel had breached the collective bargaining agreement by complying with an arbitration award rendered infirm by the Union's alleged breach. Alternatively, Mr. Benson alleged that the Union's failure to afford him an opportunity to testify violated his right to due process under the Fifth Amendment to the United States Constitution.

Ruling on cross-motions for summary judgment, the district court (MacKenzie, D.J.) accepted the report of the magistrate judge (Prince, M.J.) recommending that judgment be granted in favor of the defendants. Pet. App. 15a.

Dismissing the fair representation claim, the district court ruled that CWA did not breach its duty by "re-l[ying] upon an earlier interpretation of the meaning of 'best qualified senior applicant' " to "forcefully advocat[e] a single interpretation of the Agreement that the union has reasonably determined benefits the group as a whole." Pet. App. 12a & 13a.

As an alternative ground for dismissing Mr. Benson's statutory claims, the district court concluded that Mr. Benson was not prejudiced by the alleged breach of duty, "because Benson actively assisted Contel in preparing its case for arbitration," and the "[e]vidence that Benson says was missing at the arbitration was presented by Contel." Pet. App. 14a.

Finally, the district court dismissed Mr. Benson's constitutional claims on the grounds that CWA is a private actor, not bound by the due process clause, and that the

implied duty of fair representation is sufficient to sustain the constitutionality of the National Labor Relations Act. Pet. App. 38a-39a.

The court of appeals (Russell & Motz, C.J., and Faber, D.J.) affirmed the district court's rulings on each of the three grounds in an unpublished opinion issued after. Pet. App. 5a-9a.

ARGUMENT

The district court in this case summarily affirmed a magistrate judge's decision rejecting petitioner's claims and granting summary judgment to respondent, and the court of appeals affirmed the district court in an unpublished opinion. As those courts recognized—and as we now briefly demonstrate—petitioner's legal arguments are without substance and without support in the case law and the *certiorari* petition should therefore be denied.

1. Mr. Benson's primary argument is that "[t]he Circuit Court's decision runs roughshod over the basic principle of the DFR as to notice and hearing this Court established in *Steel v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 204 (1944)." Pet. 7. *See also id.* at 17. *Steele*, says Mr. Benson, requires that a union acting as a bargaining representative give each individual worker notice and an opportunity for hearing "whenever necessary" to furthering that individual's particular interests. *Id.* at 17-18. But the passage from *Steele* on which Mr. Benson relies is the following:

> [T]he statute . . . does require the union, in collective bargaining and in making contracts with the carrier, to *represent* nonunion or minority union members of the craft *without hostile discrimination, fairly, impartially, and in good faith.* Wherever necessary *to that end*, the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing *upon its proposed action.* [323 U.S. at 204 (emphasis added).]

Mr. Benson does *not* maintain that CWA breached its duty by failing to give him a "hearing upon its proposed action" in prosecuting the promotion bypass grievance. *See* Pet. 17. Nor does he maintain that CWA failed to act "fairly, impartially, and in good faith," by advancing an interpretation of the collective bargaining agreement that favored the promotion of the senior qualified applicant. *See* Pet. 14.

Rather, Mr. Benson takes a position that has *no* basis in *Steele*—*viz.*, that by its "dogged pursuit of its 'strict-seniority' theory[,] . . . CWA arbitrarily rejected the possibility that [the arbitrator] would accept Contel's theory," and that because of that possibility "CWA's refusal to provide Benson with notice and opportunity to be heard was arbitrary." Pet. 14-18.[1]

This Court has recently defined what it means for union conduct to be "arbitrary" in the fair representation context: "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's action, the union behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). It is plain that the Union's conduct here is not only consistent with

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[1] Mr. Benson asserts that by putting into evidence various documents concerning Ms. Kirker's basic qualifications, "CWA did not merely 'bolster' its 'strict-seniority' case, but argued a *different* factual case based on qualifications." Pet. 16 n.24. As arbitrator Harlan's award makes plain, CWA never argued a "strict seniority" case, which would have entailed a showing that seniority governs without regard to minimal qualifications. Pet. App. 54a. Rather, as the award also makes plain, the Union consistently argued throughout that the agreement contained a "sufficient ability" clause, under which seniority governs among minimally qualified applicants. *Id.* at 51a-52a (describing the Union's argument) & 55a (describing sufficient ability clauses). Under such a clause, it would be necessary to show that Ms. Kirker was minimally qualified in order to establish that she was entitled to the promotion based on seniority.

Steele but also well within its "wide range of reasonableness."

In the instant case, CWA relied on a recent arbitration decision under the same contract in advancing an interpretation that favored seniority. "[T]he union's authority as a collective bargaining representative necessarily empowers it to act according to its own reasonable interpretation of the labor contract." *Bache v. American Telephone & Telegraph Co.*, 840 F.2d 283, 290 (5th Cir.), *cert. denied*, 488 U.S. 888 (1988). That is especially true where the Union relies on an arbitration award upholding seniority, which is recognized as "a valid non-arbitrary means of allocating union benefits. . . ." *Kushto v. Broth. of Railway, Airline & SS Clerks*, 818 F.2d 290, 293 (4th Cir. 1987). *See also Steele*, 323 U.S. at 203; *Huffman*, 345 U.S. at 338-339.

Nor did CWA act irrationally by failing to invite Mr. Benson to participate in the arbitration hearing as a witness supporting the very Company decision being challenged by the Union.[2] The Union has a "legitimate interest in presenting a united front . . . and in not seeing its strength dissipated and its stature denigrated by [individuals] within the unit separately pursuing what they see as separate interests." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 70

[2] The courts below found that Mr. Benson was not prejudiced by the Union's alleged breach, because "in defending its decision to select Benson for the job, Contel placed before the arbitrator the relevant facts concerning Benson's prior job experience and qualifications." Pet. App. 8a. *See also id.* at 22a-23a (describing this evidence). Mr. Benson does not deny that Contel presented such evidence, but argues that he could have done a better job than Contel in explaining the "relation of Benson's qualifications to the requirements in the Notice. . . ." Pet. 8. *See also id.* at 8-10. As to the relation of Mr. Benson's work history to the requirements stated by the Contel in the Company's own job-posting notice, the district court was undoubtedly correct that "the arbitrator would be more interested in Contel's assessment . . . than in Benson's assessment. . . ." Pet. App. 14a.

(1975). This interest extends to presenting a united front in arbitration. *See Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 172 (5th Cir. 1971) ("It would be paradoxical in the extreme if the union, which is authorized to decide whether a grievance is to be pursued to the arbitration stage at all, could not be authorized to assume full responsibility for a grievance it did pursue, without the intervention of the individual union members immediately concerned.").

In sum, as the opinions below amply demonstrate, Mr. Benson's "argument that the duty of fair representation prevents the union from forcefully advocating a single interpretation of the Agreement that the union has reasonably determined benefits the group as a whole," Pet. App. 13a, has no basis in the fair representation case law.

2. Mr. Benson is equally wrong in his claim that "the decision [below] conflicts with decisions of another Court of Appeals and of a State supreme court on the invalidity of an arbitration-award a union obtains without notice to affected employees." Pet. 7 & n.4 citing *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980), and *Clark v. Hein-Werner Corp.*, 8 Wis.2d 264, 99 N.W.2d 132 (1959), *cert. denied*, 362 U.S. 962 (1960).

a. In asserting a conflict between the decisions below and *Smith v. Hussmann Refrigerator*, Mr. Benson relies primarily upon the *Smith* plurality opinion, Pet. 18-19. As the magistrate judge correctly notes, "[t]his part of the opinion [for three judges] was not, however, joined by any of the other five judges on the panel." *Pet.* App. 30a. Moreover, the three judge plurality's finding of a breach of duty in *Smith* rested on the determination that the union had failed to make "an informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement." 619 F.2d at 1237 (footnote omitted). By contrast, CWA's reading of the contract here was not merely

a reasonable one but the very reading of the contract that had been previously endorsed by an arbitrator.

To be sure, the majority in *Smith* did find that a secret "agreement between the company and the union to go back to the arbitrator and arbitrarily rearrange the order of preference among the plaintiffs and the other, more senior employees" was "sufficient . . . to show that the union failed to act in good faith. . . ." 619 F.2d at 1246-47.[3] While Mr. Benson pretends otherwise, Pet. 18-19, this holding does not advance his cause. In this case CWA simply did *not* collude with Contel in any way.

b. A measure of how far Mr. Benson is forced to reach to make up a lower court conflict is his reliance on the 1959 decision of the Wisconsin Supreme Court in *Clark v. Hein-Werner Corp., supra.* Pet. 19. As the magistrate judge convincingly demonstrates, "[t]he *Clark* decision clearly rests on a rationale that has been extinguished by the Supreme Court's subsequent decisions in this area. . . ." Pet. App. 29a citing *Vaca v. Sipes,* 386 U.S. 171, 182 (1967). Therefore, "*Clark* is not good law." *Id.*, quoting *Miller Brewing Co. v. Brewery Workers Local Union No. 9,* 562 F.Supp. 1368, 1373 (E.D. Wis. 1983), *aff'd in part, rev'd in part on other grounds,* 739 F.2d 1159 (7th Cir. 1984) *cert. denied,* 469 U.S. 1160 (1985).[4]

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[3] In his initial decision, the *Smith* arbitrator sustained two of the union's seniority grievances, but allowed the junior employees to maintain the higher job classification, which would be important to them in future promotions. 619 F.2d at 1234. The employer was willing to abide by this award, but the union prevailed upon the employer to jointly request the arbitrator to amend his award so that the junior employees would not maintain the higher classification. *Id.*

[4] Indeed, acknowledging that "*Clark* does state [an] arguably overboard rule," Mr. Benson no longer embraces that opinion for what it says, but instead is reduced to rewriting that opinion by stating what he believes "the *Clark* court implicitly recognized" and conjecturing as to what "the *Clark* court clearly would have

3. Finally, Mr. Benson challenges the lower courts' ruling "den[ying] there is state action in the status of an exclusive representative under NLRA § 9(a) . . ." Pet. 7.

Mr. Benson argues that *Steele* "decided that state action exists under the analogous [exclusive representation] provision of the Railway Labor Act." Pet. 7. This misreading of *Steele* is not new. In *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), the respondents advanced an identical state action argument:

> Congress has endowed labor unions with extraordinary authority. It has made unions the exclusive representative of the employees for whom they bargain whether the employee desires such representation or not. * * * Such authority is governmental in nature; indeed, this Court stated in *Steele v. Louisville & N.R.*, 323 U.S. 192 (1944), that the bargaining ". . . representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations . . . ." 323 U.S. at 198; . . . . [Brief for *Sadlowski* Respondents 48.]

This Court dismissed this argument as unsound stating that the union's conduct "does not involve state action." *Sadlowski*, 457 U.S. at 121 n.16, citing *Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (holding that the exercise of the power to act as an exclusive representative under the NLRA "does not involve state action"). Consistent with this Court's state action rulings, the circuit courts have repeatedly declined to apply constitutional due process requirements to private grievance-arbitration procedures. *See Bures v. Houston Symphony Society*, 503 F.2d 842, 843 (5th Cir. 1974); *Ramsey v. NLRB*, 327 F.2d 784, 788 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).

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countenanced. . . ." Pet. 19 n.36. Mr. Benson's effort to give *Clark* a saving reinterpretation relies entirely on *Thompson v. Int'l Ass'n of Machinists*, 258 F. Supp. 235 (E.D. Va. 1966), Pet. 19. As the Fourth Circuit decision in this case recognizes, *Thompson* is of no aid to Mr. Benson in this regard. Pet. App. 7a.

This is not to say that individual employees have no recourse against unfair treatment by their exclusive representative. "[T]he duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor laws." *Vaca v. Sipes, supra,* 386 U.S. at 182. "It is well-settled . . . that the union's duty of fair representation, prohibiting it from acting arbitrarily, discriminatorily, or in bad faith toward any member, adequately protects the individual's interests." Pet. App. 15a. For this reason, the courts below correctly rejected "Benson's argument . . . that he is constitutionally entitled to represent himself, independently from his bargaining unit and contrary to the collective bargaining scheme established by Congress in enacting the federal labor laws." *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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